STATE OF MICHIGAN

COURT OF APPEALS

THRESSA MAHONE, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 320872 Oakland Circuit Court Family Division
BARRY NOBLE, Defendant-Appellant.	LC No. 2011-791302-DP

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right the order granting plaintiff sole legal and physical custody of the minor child and setting forth supervised parenting time for defendant. We reverse and remand for proceedings consistent with this opinion.

This appeal arises out of a custody dispute between plaintiff and defendant. The circuit court entered a consent judgment awarding the parties joint legal and physical custody of the child. Subsequently, both plaintiff and defendant filed separate motions with each party seeking sole legal and physical custody. Following a hearing, the Friend of the Court (FOC) referee issued a recommendation and proposed order awarding plaintiff sole legal and physical custody of the child. Defendant failed to file a written objection within 21 days after having been served with the recommendation and proposed order, and the proposed order was entered as a final order. Defendant filed a written objection one day after the 21 day deadline. The trial court did not address the objection and denied defendant's motion to set aside the custody order.

Defendant contends that the circuit court erred by entering the custody order without making a determination with regard to whether an established custodial environment existed. We agree.

Generally, an issue is not properly preserved for appellate review if it is not raised before, and addressed and decided by, the trial court. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Because defendant did not object to the referee's custody recommendation within 21 days as required by MCL 552.507(4) and MCR 3.215(E)(4), and also failed to raise the issue in the motion to set aside the custody order, the issue is unpreserved. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Normally, this Court must affirm all custody orders "unless the trial court's findings of fact were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008); see also MCL 722.28. A trial court's factual findings are against the great weight of the evidence if the facts "clearly preponderate in the opposite direction." *Shade v Wright*, 291 Mich App 17, 21; 805 NW2d 1 (2010). In custody cases, an abuse of discretion occurs when "the trial court's decision is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705. A trial court's custody decision is entitled to "the utmost level of deference." *Id*. at 705-706. A clear legal error occurs when the trial court "errs in its choice, interpretation, or application of the existing law." *Shade*, 291 Mich App at 21. Because this issue is unpreserved, this Court reviews the alleged error to determine whether a plain error occurred that affected substantial rights. *Kern v Blethen–Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). " 'To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Rivette*, 278 Mich App at 328-329, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Child Custody Act, MCL 722.21 *et seq.*, governs child custody disputes. *Berger*, 277 Mich App at 705. Custody awards are governed by MCL 722.27, which provides, in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> * * *
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> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.

"The established custodial environment is the environment in which 'over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.' " *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010), quoting MCL 722.27(1)(c). "It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger*, 277 Mich App at 706. Under the plain language of MCL 722.27, "a trial court is required to determine whether there is an established custodial environment with one or both parents before making *any* custody determination." *Kessler v Kessler*, 295 Mich App 54, 61; 811 NW2d 39 (2011) (emphasis in original).

Both parties' motions sought to modify custody. The matter was submitted to a referee for a hearing on December 19, 2013, and on January 9, 2014, the referee issued a recommendation and proposed order that awarded plaintiff sole legal and physical custody of the minor child. The referee's findings provided:

> Father must demonstrate by a preponderance of evidence either proper cause or change in circumstances sufficient before the Court can even consider modifying the existing custody order. Circumstances have changed since the last order was entered, but not necessarily circumstances that would lead to increasing Father's parenting time or custody rights, since the CPS and Prosecutor investigations into whether [the minor child] is the product of rape by Father are included in those circumstances.
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> Father's request for sole legal and physical custody, and Mother's request for supervised parenting time for Father were reviewed pursuant to MCL 722.27. MCL 722.27 refers to "the best interests of the child" and therefore the factors as enumerated in MCL 722.23 of the Child Custody Act were used to consider modifying custody and to assess what parenting time should be awarded to both parties.
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> Based on the testimony presented, factors a, c, d, e, f, g, h, j, and 1 support an award of sole legal and physical custody to Mother. The child's preference (factor i) was not considered. Father's request for sole legal and physical custody is denied.

Defendant failed to file a written objection within 21 days after the referee's recommendation and order was provided to him. Thereafter, the court entered the proposed order as the final order.

Defendant argues that the court never made any determination, or placed on the record any findings, with regard to whether an established custodial environment existed with one parent or both, and whether plaintiff's motion to change custody would have caused a change in the custodial environment. Under MCL 722.27, it is well-established that the court is required to determine whether there is an established custodial environment with one or both parents before making any custody determination. *Kessler*, 295 Mich App at 61.

Motions for a change in custody may be submitted to a referee for hearing. MCL 552.507(2)(a). Within 21 days after the referee hearing, the referee must either make a statement of findings on the record, or submit a written, signed report containing a summary of testimony and a statement of findings. MCR 3.215(E)(1). In either event, the referee must make a recommendation for an order. *Id*. The referee must find facts specially and state separately the law the referee applied, and the recommended order must include:

> (i) a signature line for the court to indicate its approval of the referee's recommended order;

(ii) notice that if the recommended order is approved by the court and no written objection is filed with the court clerk within 21 days after the recommended order is served, the recommended order will become the final order;

(iii) notice advising the parties of any interim effect the recommended order may have; and

(iv) prominent notice of all available methods for obtaining a judicial hearing. [MCR 3.215(E)(1)(a), (b)(i)-(iv).]

Thereafter, a party may obtain a "de novo hearing," otherwise known as a "judicial hearing," on any matter that was the subject of a referee hearing by filing a written objection within 21 days after the recommended order was served on the party. MCL 552.507(4); MCR 3.215(E)(4). If the recommendation is approved by the court, and no written objection is filed with the court clerk within 21 days after service, the recommended order will become a final order. MCR 3.215(E)(1)(c).

This Court, in *Rivette*, 278 Mich App at 330, analyzed whether a referee hearing absolves the referee of the responsibility to examine the best interest factors, and, even in the absence of a written objection filed within 21 days after service, whether the circuit court must satisfy itself that the best interests of the child were considered before entering a final custody order. This Court held:

> It would stand to reason that, if an analysis of the best interest-factors is required in the circuit court to assure that the custody determination is based on an informed decision about the child's best interest, a referee's custody recommendation—which the circuit court may uphold without making any independent findings concerning the child's best interests—likewise should include consideration of the best-interest factors. Although a referee perhaps need not engage in the same type of in-depth, lengthy analysis as a judge in a custody hearing would, some meaningful consideration of the best-interest factors is nevertheless necessary to ensure that the referee considers all the relevant criteria and makes an informed decision. [*Id*.]

This Court specifically found that even when a party fails to file written objections to the referee's recommendation and order, the circuit court committed its own error by entering a final custody order without satisfying itself that the referee considered the best interests of the child, or by making its own findings regarding the best interest factors. *Id*. at 332-333.

Because it is well-settled that the circuit court must first make the threshold finding of the existence of an established custodial environment, the holding in *Rivette* is equally applicable to the established custodial environment determination. Both an established custodial environment determination and a best interests analysis are required before the circuit court can modify an existing custody order. The trial court is not only required to ensure that the referee meaningfully considered the best interest factors, but also, that the referee made an established custodial environment determination in order to examine whether the modification of the

existing custody order would change that custodial environment, and to set the proper burden of proof in regard to the best interests of the child.

In this case, the referee failed to make any findings regarding the established custodial environment in addressing plaintiff's motion for sole legal and physical custody of the child and did not set forth any burden of proof. Consequently, the trial court erred by entering the final custody order without a determination regarding an established custodial environment at any point in the proceedings. The failure to make this determination is "not harmless because the [] determination regarding whether an established custodial environment exists determines the proper burden of proof in regard to the best interests of the children." *Kessler*, 295 Mich App at 62; see also *Foskett v Foskett*, 247 Mich App 1, 6-7; 634 NW2d 363 (2001). Given that the decision whether the child had an established custodial environment is a question of fact for the trial court, this Court refrains from engaging in a de novo review. *Kessler*, 295 Mich App at 62. Therefore, remand is necessary in order to determine whether an established custodial environment exists, and if so, whether it was with one parent, both, or neither parent. *Foskett*, 247 Mich App at 6-7.

Defendant also contends that the trial court erred by entering the custody order without an adequate analysis of the best interest factors under MCL 722.23. We agree.

In making a custody determination, a circuit court is required to evaluate the best interests of the child under the statutorily enumerated factors. MCL 722.27(1)(c); *Harvey v Harvey*, 470 Mich 186, 187; 680 NW2d 835 (2004). "A trial court must consider all the factors delineated in M.C.L. § 722.23(a)-(*l*)" and "must consider and explicitly state its findings and conclusions with respect to each of these factors." *Foskett*, 247 Mich App at 9.

In *Rivette*, 278 Mich App at 328, the defendant contended that the referee erred by failing to make findings and consider the best interest factors, and that the circuit court erred in upholding the referee's recommendation without satisfying itself that the best interests factors were considered. This Court stated that the referee need not engage in the same in-depth, lengthy analysis as a judge, but that "some meaningful consideration of the best-interest factors is . . . necessary to ensure that the referee considers all the relevant criteria and make an informed decision." *Id*. at 330. The *Rivette* Court recognized, "that regardless of the type of alternative dispute resolution that parties use, the Child Custody Act requires the circuit court to determine independently what custodial placement is in the best interests of the children, emphasizing that the statutory best-interest factors control whenever a court enters an order affecting child custody." *Id*. at 332-333, citing *Harvey*, 470 Mich at 186 (footnote omitted). The *Rivette* Court held that an order affecting custody without the court satisfying itself that the referee considered the best interests of the child, or making its own findings with respect to the best interests factors, is an error prejudicing the party. *Rivette*, 278 Mich App at 333.

In this case, the referee's recommendation and order provided:

> [b]ased on the testimony presented, factors a, c, d, e, f, g, h, j, and 1 support an award of sole legal and physical custody to Mother. The child's preference (factor i) was not considered. Father's request for sole legal and physical custody is denied.

The trial court, without referencing the referee's decision or making any independent determination concerning the best interests factors, entered the referee's recommendation and order as a final order. Although the referee recognized that MCL 722.23 sets forth the best interest factors, a review of the record reveals that the referee failed to adequately consider the best interest factors in making the custody determination. The referee not only failed to make findings with respect to each factor, but also failed to come to a conclusion regarding whom each factor favored. The record suggests that the referee only considered defendant's motion to change custody, and paid no attention to the fact that plaintiff was also seeking sole custody, comprising a change from the previous order awarding joint legal and physical custody. The referee made no mention of plaintiff's motion, and merely stated "Father's request for sole legal and physical custody, and Mother's request for supervised parenting time for Father are reviewed pursuant to MCL 722.27," and then denied "Father's request for sole legal and physical custody."

The referee failed to make adequate findings and conclusions regarding each best interest factor, and the trial court neither satisfied itself that the referee considered the best interests of the child, nor made its own findings with respect to the best interest factors. "Where a trial court fails to consider custody issues in accordance with the mandates set forth in MCL 722.23 'and make reviewable findings of fact, the proper remedy is to remand for a new child custody hearing.' " *Foskett*, 247 Mich App at 12, quoting *Bowers v Bowers*, 190 Mich App 51, 56; 475 NW2d 394 (1991). Accordingly, we remand the matter to the trial court with instructions to make a finding regarding the established custodial environment, determine the applicable burden of proof, weigh the best interest factors, and make a custody determination. As a result of the conclusions above, any further allegation of error by defendant need not be addressed by this Court.

Reversed and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Donald S. Owens